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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 220.

JOVITA PEREZ,
Petitioner,

v.

THE UNITED STATES,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN G. LERCH,
Counsel for Petitioner.

PREW SAVOY,
DAVID A. GOLDEN,
Of Counsel.

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Argument.

Petitioner, in its Petition for a Writ of Certiorari, has presented to this Court questions of national importance which should be determined by this Court.

They are the questions which were presented to the Trial Court and to the First Division (Appellate Term) of the United States Customs Court, by reason of the conclusions contained in Government Exhibit 6, based on T. D. 48860, which had resulted in the appraisement of which Petitioner complains.

These questions are:

(1) What is the addition for profit * * * equal to the profit which ordinarily is added * * * by

manufacturers * * * in determining cost of production under Section 402(f) of the Tariff Act of 1930?

(2) Did the Secretary of the Treasury exceed his powers in promulgating T. D. 48860?

(3) Did the United States Court of Customs and Patent Appeals correctly apply Section 402(f) of the Tariff Act of 1930, in determining cost of production of "El Masco"?

The Government, in its Brief in Opposition, ingeniously seeks to persuade this Court that the sole issue presented in this case is whether there was sufficient evidence to support the findings of the Trial Court, and that the issue results from facts peculiar to this case (Br. in Op., p. 4), none of which is true.

If this Court is misled by this position, as was the Court of Customs and Patent Appeals, where this was the sole question briefed and argued by the Government, but not the importer, then the Treasury Department will continue to apply T. D. 48860, unquestioned, to the damage of this Petitioner and of thousands of other importers. That is the result which the Government, in fact, seeks to accomplish by its Brief in Opposition.

Counsel for Petitioner would not have the temerity, nor do they have the lack of experience, to ask this Court to review a question of the type which Respondent says is involved.

One does not get to the question which Respondent has presented, until T. D. 48860 has been applied, as there is no occasion to examine ultimate profits, except under T. D. 48860, the very reason why Petitioner contends that that Treasury Decision is not in accordance with the statute.

Section 402(f) of the statute is clear. Four elements are required to be *added.*

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, *at a time preceding the date of exportation of the particular merchandise* under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business. (Italics supplied.)

(2) The addition for usual general expenses of such or similar merchandise, referred to in (1).

(3) Cost of all containers incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States.

(4) An addition for profit of a sum equal to the profit which ordinarily *is* added, in the case of merchandise of the same general character as the particular merchandise under consideration.

This language has been the statutory language since 1922. Prior thereto, the definition of value for the appraisement of imported merchandise was the actual market value or wholesale price thereof, *at the time of exportation to the United States,* in the principal markets of the country from whence exported.

Thus, it is clear that you add four specifically defined items determined in amount *at a time prior to, or at the very time of exportation.*

There is no provision of law, nor has there been a court decision that determines value based upon figures

or facts that happened *subsequent* to the exportation of the merchandise from the foreign country and its importation into the United States, as required by T. D. 48860.

That the "time of exportation" has been the focal point for ascertaining value of imported merchandise for over fifty years, is evidenced by the following quotation from the opinion of Chief Justice Fuller of this Court, in *United States* v. *Passavant,* 169 U. S. 16, 22:

> "What was to be ascertained was the actual market value or wholesale price of the merchandise as bought and sold in usual wholesale quantities at the time of exportation, in the principal markets of the country from whence imported. This market value or price was the price in Germany and not the price after leaving that country, and the act does not contemplate two prices or two market values."

From the above, we respectfully submit that the Court below erred in considering factors which happened subsequent to the date of exportation.

T. D. 48860 and the decision of the Court of Customs and Patent Appeals do not add the four elements required to be added by Section 402(f) of the statute, and they take into account factors which happened subsequent to the date of exportation.

T. D. 48860 instructs appraisers to take the selling price in the United States (United States value—a basis which it has been agreed is inapplicable), to deduct therefrom certain costs and the estimated duty, which is the very thing to be determined herein, and to conclude that the balance, if any, is the "profit

added". This so-called profit is then added back, and the basis for appraisement is determined. This whole procedure is violative of the expressed provisions of the statute and its use should be prohibited by this Court, when cost of production is the basis of an appraisement.

After giving effect to T. D. 48860 (R. 185-186) and failing to give effect to manufacturers' practices in computing selling prices, which is to make an addition for profit—at that time—the Court of Customs and Patent Appeals then considered the evidence in the light of its error. The Court only then concluded that, "It naturally follows that the profit usually added is the profit actually added".

The Court did not weigh the evidence in connection with the question as to what the addition for profit was at the time of exportation—but as determined by subsequent events, and found the books of some exporters inadequate to determine ultimate profits—not the profit added when selling prices were determined—and the testimony of Walter S. Mack insufficient because made prior to manufacture.

Petitioner is not asking this Court to weigh the evidence, but again wishes to point out that when Walter Mack fixed the selling price of "El Masco" at $296.00 per unit, all costs except labor were known, and the profit added was $44.00 (R. 25-29, 100). This is the profit "usually added * * * by manufacturers" because this exporter was by far the largest manufacturer of this product.

True, the "realized profit" of all exporters was more or less than the profit added at the time of the "addition for profit", as it was bound to be, but what has that to do with the statute?

The Court of Customs and Patent Appeals, confused

by T. D. 48860, proceeded to weigh this evidence in connection with realized profit, and found it inadequate. It could do so only after applying T. D. 48860 —not upon its application of the express language of the statute.

Also, so-called "realized profit" or "profit actually added" cannot be *actual* profit, as this Court will readily see, but it is the profit computed under T. D. 48860.

Extraordinary expenses actually paid out of pocket are eliminated, when Section 402(f) is properly applied (R. 38-40). Yet, they are contained in the profit computed by Respondent and the Court below under T. D. 48860. The difference between the 55.18076% and 11.63972%, for overhead, is shown by Government Exhibit 6 (R. 76) to be taxes paid to the Mexican Government by the manufacturer of "El Masco". While not usual general expenses, as enumerated in Section 402(f), they were actually a production cost, and in no sense a profit. Yet they are contained in the so-called "realized profit", or profit "actually added".

Furthermore, actual profit cannot be determined until after the close of this suit, because the importer's obligation for duty cannot be ascertained until the final decision of this case.

Finally, there can, in any event, be no actual profit in the first unit of six barrels of "El Masco" which were imported after the manufacturer went into business. The manufacturer went into business in November, 1942 (R. 91). This first unit was imported November 24, 1942. It is notorious that a company must be in production for some time before any profit can be realized.

From the foregoing, it would seem axiomatic that Congress could not, by the words, "an addition for profit which ordinarily is added by manufacturers", have intended that "realized profit" was to be taken. T. D. 48860 prescribes a formula for figuring an arbitrary "realized profit". This Treasury Decision formed the basis for the decision below. Congress must have meant the profit which is actually added by manufacturers when they establish the selling price.

The profit which "ordinarily is added * * * by manufacturers" is the profit which was actually added by the manufacturer of "El Masco", when the selling price of "El Masco" was determined. True, the selling price was limited by a ceiling which would permit the manufacture and sale of Pepsi-Cola at five cents a bottle, just as the selling price of any article may be limited by competition. But, that does not affect the fact that the profit actually added was $44.00 per unit, and that this was the profit which is ordinarily added.

Respondent glosses over the practice of manufacturers making an addition for profit at the time they fix selling prices, with the extraordinary statement that Petitioner has failed to show that such method is superior to that employed in T. D. 48860, and further suggests that Petitioner has failed to show wherein T. D. 48860 violates the statute (Br. in Op., p. 11).

T. D. 48860 violates the statute (1) by not adding an addtion for profit, when the selling price is determined, at the time of, or prior to, exportation, and by substituting therefor a completely erroneous so-called "realized profit", and (2) by taking events after exportation to determine the profit "actually added".

It would seem hardly necessary to point out a second time that the so-called "estimated profit", in determining the selling price of "El Masco", is the method employed by manufacturers generally when they establish selling prices (Pet. Br. 13, Apps. IV & V) and that Congress must be presumed to have known business practices, when it adopted the particular language of the statute, and to have given it recognition. The method adopted by the Trial Court is the statutory method, while the method adopted by the Court below and the Government, under T. D. 48860, is an arbitrary method.

The question involved, as represented by Petitioner, is of great importance to importers. It does not depend upon "unique circumstances". Thousands of importers are, and will be, affected.

In the Port of New York alone, from July 1, 1948, to June 30, 1949, there were 213,261 entries.

About one per cent are based upon either American selling price or United States value (Customs Valuation in the United States, R. Elberton Smith, 1948, p. 196).

It is estimated that slightly more than four per cent are based upon "cost of production", the remainder being based upon foreign and export value.

Thus, in the Port of New York alone, in one year, at least 8,000 or 9,000 entries were affected by T. D. 48860.

The question presented is not one to be ignored or lightly passed over, as does the Brief in Opposition.

CONCLUSION.

The question presented is as represented by Petitioner. The question is of national importance. The Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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